

N. 2847

Nos. 14030, 14031, 14032, 14033, 14034

United States
Court of Appeals
For the Ninth Circuit.

LEE GWAIN TOY and LEE GWAIN DOK, by
Their Father and Next Friend LEE BEN
KOON,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the
United States,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

NOV 25 1953

PAUL P. O'BRIEN



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LEE GWAIN TOY and LEE GWAIN DOK, by
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

RODNEY W. BANKS,

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Portland 4, Oregon, and

J. P. SANDERSON,

301-2 Second & Cherry Building,
Seattle 4, Washington,

For Appellants.

HENRY L. HESS,

United States Attorney, and

VICTOR E. HARR,

Assistant United States Attorney,

United States Courthouse,
Portland, Oregon,

For Appellee.

In the District Court of the United States
for the District of Oregon

No. Civ. 6757

LEE GWAIN TOY and LEE GWAIN DOK, by
Their Father and Next Friend, LEE BEN
KOON,

Plaintiffs,

vs.

DEAN G. ACHESON, Secretary of State of the
United States of America,

Defendant.

COMPLAINT

Comes now Lee Gwain Toy and Lee Gwain Dok,
by their father and next friend, Lee Ben Koon, and
for cause of action allege as follows:

I.

That plaintiffs, Lee Gwain Toy and Lee Gwain Dok, bring this action through their father and next friend, Lee Ben Koon, a citizen of the United States and a resident of Portland, Multnomah County, Oregon.

II.

That the defendant, Dean G. Acheson, is the duly appointed, qualified and acting Secretary of State of the United States of America; and that the American Consul General at Hong Kong is an officer of the United States and an executive official of the Department of State of the United States,

acting under and by direction of defendant, Dean G. Acheson, as Secretary of State.

III.

That jurisdiction of this action is conferred upon this court by Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C. 903.

IV.

That the plaintiff, Lee Gwain Toy, was born in Lun Hing Village, Kwang Tung, China, on the 14th day of March, 1934, and plaintiff, Lee Gwain Dok, was born in Lun Hing Village, Kwang Tung, China, on the 12th day of December, 1932, and they are presently residing in Hong Kong, and are citizens of the United States under Section 1993 of the Revised Statutes, 8 U.S.C. 6, First Edition.

V.

Lee Ben Koon, the father of the plaintiffs, was born in China in the year 1912 and arrived in the United States at Seattle, Washington, April 9, 1928, on the Steamship President Grant and was then admitted into the United States as a Citizen thereof on the ground and for the reason being that he was a foreign born son of a native citizen of the United States, as provided for by Section 1993 of the Revised Statutes, 8 U.S.C. 6, First Edition.

VI.

That the plaintiffs, Lee Gwain Toy and Lee Gwain Dok, are citizens of the United States under Section 1993 of the Revised Statutes, 8 U.S.C. 6, First Edi-

tion, and claim the City of Portland, Oregon, as their permanent residence, which is the place of residence of their father and within the jurisdiction of this court; that plaintiffs claim the right of entering the United States as Nationals and/or Citizens of said United States.

VII.

That said Lee Ben Koon caused to be filed with the American Consul General at Hong Kong his affidavit—application, dated February 9, 1952, prepared in accordance with the regulation for a passport or travel document in behalf of the said Lee Gwain Toy and prepared a similar affidavit-application, dated March 17, 1952, in behalf of Lee Gwain Dok, in order that the plaintiffs would be eligible to purchase transportation to the United States in order to apply for admission as Citizens thereof at a port of entry under the Immigration Laws.

VIII.

That although the plaintiffs have been interviewed by the said American Consulate at Hong Kong, no action has been taken by the said Consulate concerning the issuance of passports or travel documents and the plaintiffs believe and therefore allege that the said American Consulate has no intention of issuing to plaintiffs passports or travel documents, and that the said American Consulate's failure to issue such passports or travel documents constitutes an unreasonable and unfair delay and a denial of plaintiffs' rights as American Citizens,

and plaintiffs have been thereby denied from coming to the United States and from applying and presenting the proof of their citizenship to the Immigration and Naturalization Service at a port of entry; that since the said American Consulate has refused to take any action as aforesaid, there has been no official denial of the plaintiffs' petitions by the said American Consulate and, therefore, the defendant did and has refused to take cognizance of any appeal, and that the said American Consulate by their delaying tactics has prevented the plaintiffs from taking any action by appeal or otherwise, and the plaintiffs' only remedy is under Section 503 of the Nationality Act of 1940 for the reason that they can obtain no relief whatsoever from the said American Consulate.

IX.

That this case is held subject to investigation and consideration under a new and secret system limited to the Chinese Race, devised by the American Consul General at Hong Kong, not within any regulation, and of a class restriction within the term "Class Legislation" and therefore is in violation of law.

X.

That plaintiffs, Lee Gwain Toy and Lee Gwain Dok, claim United States Nationality and Citizenship in good faith and on a substantial basis.

Wherefore, plaintiffs, Lee Gwain Toy and Lee Gwain Dok, pray for an order and judgment of this court as follows:

(1) That an order directed to the defendant, Dean G. Acheson, to issue and grant plaintiffs a Certificate of Identity in order that they be eligible to obtain transportation to the United States and be temporarily admitted under bond, in the sum of \$500.00 each, for the purpose of prosecuting said claims of citizenship in this court.

(2) That a decree be entered herein adjudging Lee Gwain Toy and Lee Gwain Dok to be Nationals and/or Citizens of the United States.

(3) That plaintiffs be granted such other and further relief as may be just in the premises.

/s/ RODNEY W. BANKS,

/s/ J. P. SANDERSON,

Attorneys for Plaintiff.

[Endorsed]: Filed December 19, 1952.



[Title of District Court and Cause.]

ANSWER

Comes now Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for and on behalf of the defendant above named, and in answer to the complaint on file herein, admits, denies and alleges as follows:

1. Denies the allegations of Paragraph I.
2. Admits that during the times involved herein, the allegations as contained in Paragraph II of said complaint were true.
3. Admits the allegations of Paragraph III.

4. Answering Paragraphs IV, V, VI, VII, VIII, IX and X, defendant lacks information as to the truth or falsity of the allegations therein contained, and therefore denies the same and puts plaintiff to proof thereon.

Wherefore, defendant, having fully answered plaintiff's complaint, prays that the same be dismissed and held for naught and that defendant recover its costs and disbursements incurred herein.

HENRY L. HESS,

United States Attorney for
the District of Oregon;

/s/ VICTOR E. HARR,

Assistant United States
Attorney.

I, Victor E. Harr, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Answer of defendant by depositing in the United States Post Office at Portland, Oregon, on the 16th day of February, 1953, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Rodney W. Banks, 1208 Public Service Building, Portland 4, Oregon, and J. P. Sanderson, 301-2 Second & Cherry Building, Seattle 4, Washington, attorneys of record for plaintiffs.

/s/ VICTOR E. HARR,

Assistant United States
Attorney.

[Endorsed]: Filed February 16, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

The Attorney General of the United States, by and through Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, moves the Court for an order dismissing the above-entitled case upon the ground and for the reason that the complaint herein, on its face, shows that applications for passports have not been denied plaintiffs and therefore plaintiffs have not been denied any rights on their alleged claim of citizenship, a jurisdictional requirement under Title 8, Section 903, U.S.C.

Dated at Portland, Oregon, this 6th day of April, 1953.

HENRY L. HESS,

United States Attorney for
the District of Oregon;

/s/ VICTOR E. HARR,

Assistant United States
Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 6, 1953.

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF
PARTY DEFENDANT

The plaintiffs move the court as follows:

For an order substituting John Foster Dulles, Secretary of State of the United States of America, as party defendant for Dean G. Acheson, formerly Secretary of State of the United States of America, on the ground that said Dean G. Acheson has ceased to hold the office of Secretary of State of the United States of America and that the said John Foster Dulles has been appointed to such office and qualified as such officer of the United States of America, and that there is substantial need for continuing and maintaining the above-entitled action.

RODNEY W. BANKS,

J. P. SANDERSON,

By /s/ RODNEY W. BANKS,

Of Attorneys for Plaintiffs.

[Endorsed]: Filed April 15, 1953.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
SUBSTITUTION OF PARTY DEFENDANT

State of Oregon,

County of Multnomah—ss.

I, Rodney W. Banks, being first duly sworn, depose and say:

That I am one of the attorneys for the plaintiffs in the above-entitled action. That Dean G. Acheson ceased to be Secretary of State of the United States of America by resignation on the 22nd day of January, 1953, on which date John Foster Dulles was sworn in and qualified as Secretary of State of the United States of America by appointment of the President of the United States of America. That the American Consul General at Hong Kong, China, is now acting under and by direction of the said John Foster Dulles, Secretary of State of the United States of America. That the said John Foster Dulles, Secretary of State of the United States of America, has not indicated any change in ruling or attitude concerning relief prayed for in plaintiffs' complaint from that of his predecessor, the defendant above named.

That in order to obtain the relief prayed for in plaintiffs' complaint, under the provisions of Section 503 of the Nationality Act of 1940, 54 Stat. at large 1171; 8 U.S.C.A., 903, it is necessary to continue and maintain, and there is substantial need for continuing and maintaining, said action, and that the said John Foster Dulles, Secretary of State of the United States of America, be substituted as party defendant under the provisions of Rule 25-D of the Court Rules of Procedure.

/s/ RODNEY W. BANKS.

Civ. 6752

LEE WING GUE, by His Father and Next Friend,
LEE SUN YUE,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the
United States of America,

Defendant.

Civ. 6757

LEE GWAIN TOY and LEE GWAIN DOK, by
Their Father and Next Friend, LEE BEN
KOON,

Plaintiffs,

vs.

DEAN G. ACHESON, Secretary of State of the
United States of America,

Defendant.

Civ. 6762

LOUIE HOY GAY, by His Father and Next
Friend, LOUIE FOO,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the
United States of America,

Defendant.

Civ. 6763

CHIN CHUCK MING and CHIN CHUCK SANG,
by Their Next Friend and Father, CHIN AH
POY,

Plaintiffs,

vs.

DEAN G. ACHESON, Secretary of State of the
United States of America,

Defendant.

MEMORANDUM OPINION

May 25, 1953

James Alger Fee, Chief Judge:

In each of these cases, it has been represented that the petitioner is a resident of China who has never been in the United States and who claims citizenship by birth in a foreign country through his father, who is claimed to be a citizen of the United States. The history of the Chinese cases which have been administratively handled with appeal to the appellate courts of the federal system convinces the Court that the statute under which these cases were brought was not intended as a substitute for the administrative hearing by experts, which has been used for half a century. The danger of fraud in these cases has been apparent during that time, and, with the present disturbed political situation in China, which also affects the world, it is the opinion of the Court that the State Department should not be required to bring these persons into the country and release them for the purpose

of trying out the question of their citizenship in the courts.

Aside from that point, however, in these cases the proceeding was originally brought against Dean G. Acheson, as Secretary of State, and in each a motion has been made to substitute John Foster Dulles. The Court is of opinion that the new Secretary of State should have an opportunity to have these questions passed upon originally by his administrative staff, and thereafter, if this statute is applicable, the actions could be filed again. The Court therefore finds that the plaintiffs have not shown that there is a substantial need for continuing the within actions against John Foster Dulles, successor to Dean G. Acheson, or that the former adopt or continue or threaten to adopt or continue the action of his predecessor. In view of the fact that substitution cannot be made, the Court dismisses each of these causes.

The last case differs from the others in that no motion for substitution has been filed. The same considerations apply. But, under the circumstances, it is dismissed for failure to prosecute.

[Endorsed]: Filed June 1, 1953.

In the United States District Court
for the District of Oregon

Civil No. 6757

LEE GWAIN TOY and LEE GWAIN DOK, by
Their Father and Next Friend, LEE BEN
KOON,

Plaintiffs,

vs.

DEAN G. ACHESON, Secretary of State of the
United States of America,

Defendant.

ORDER OF DISMISSAL

This matter came on to be heard before the undersigned Judge on Monday, April 20, 1953, upon motion of defendant by and through Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an order dismissing the above-entitled case upon the ground and for the reason that the complaint on its face shows that application for passport had not been denied plaintiffs and therefore plaintiffs have not been denied any rights on their alleged claim of citizenship, a jurisdictional requirement under Title 8, Section 903, U.S.C.A.; and it appearing that there is on file in the within cause a motion of plaintiffs, through their attorneys, Rodney W. Banks and J. P. Sanderson, for an order to substitute John Foster Dulles, Secretary of State of the United States of America, as party defendant for Dean G. Acheson, formerly the Sec-

retary of State of the United States of America, on the ground that there is substantial need for continuing and maintaining the above-entitled action; and further that it having been stated into the record by plaintiffs' counsel that plaintiffs have never resided in the United States; and the Court having considered the record herein, statement of counsel, Rodney W. Banks, of attorneys for plaintiffs, and Victor E. Harr, of attorneys for defendant, and being of the opinion that Congress in enacting Section 903, Title 8, U.S.C.A., never intended said section to be applicable to the claims of the nature herein asserted by plaintiff, and being advised in the premises, it is

Ordered that plaintiffs' motion to substitute John Foster Dulles, Secretary of State of the United States of America, as party defendant for Dean G. Acheson, be and it is hereby denied, and

It Is Further Ordered that defendant's motion to dismiss the above-entitled cause upon the ground and for the reason that the complaint on its face shows that plaintiffs' applications for passports had not been denied them, be and the same is hereby allowed, and

It Is Further Ordered that the within cause be and the same is hereby dismissed for the following reasons:

1. That the application as made to the American Consulate Officer of the Department of State by plaintiffs to permit plaintiffs' entry into the United States has never been denied plaintiffs;
2. That plaintiffs have failed to show, in accord-

ance with Rule 25(d), Federal Rules of Civil Procedure, that there is a substantial need for continuing the within action or that John Foster Dulles, successor to Dean G. Acheson, adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States;

3. That plaintiffs have never resided in the United States; and

4. That the Congress in enacting Section 903, Title 8, U.S.C.A., never intended that individuals asserting claims such as that asserted by plaintiffs herein, who have lived their lives as Chinese and who have never been in the United States, have the status and right to avail themselves of Section 903, Title 8, U.S.C.A.

Made and entered this 18th day of June, 1953.

/s/ JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed June 18, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Henry L. Hess, United States Attorney for the District of Oregon, attorney for defendant:

Notice is hereby given that Lee Gwain Toy and Lee Gwain Dok, by Lee Ben Koon, their next friend, the plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Cir-

cuit from the judgment docketed and entered in this action on the 18th day of June, 1953, in favor of the defendant and against plaintiffs.

/s/ RODNEY W. BANKS,
Of Attorneys for Plaintiffs;
J. P. SANDERSON,
Of Attorneys for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed August 11, 1953.

[Title of District Court and Cause.]

BOND FOR COSTS

Know All Men by These Presents, That we, Lee Gwain Toy and Lee Gwain Dock by Lee Ben Koom, their next friend, and the American Surety Company of New York, as Surety, are held and firmly bound unto Dean G. Acheson, Secretary of State of the United States of America, his executors, administrators, or assigns, in the sum of Two Hundred Fifty & No/100 (\$250.00) dollars, lawful money of the United States of America, to be paid unto the said Dean G. Acheson, Secretary of State of the United States of America, his executors, administrators, or assigns, to which payment well and truly to be made, we do bind and oblige our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of June, A.D. 1953.

Whereas, the above-named Lee Ben Koom heretofore is citizen of the State of Oregon commenced an action in the United States District Court, in and for the District of Oregon, against the said Dean G. Acheson, Secretary of State of the United States of America.

Now, Therefore, the Condition of This Obligation is such that if the above-named Lee Gwain Toy and Lee Gwain Dock by Lee Ben Koom in the said action shall pay on demand, all costs that may be adjudged, or awarded against them as aforesaid in said action; then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

/s/ LEE BEN KOON.

[Seal] AMERICAN SURETY COM-
 PANY OF NEW YORK,

By /s/ JEAN D. SAUNDERS,
 Res. Vice President.

Attest:

/s/ JEANNE SIEBEN,
 Res. Asst. Secretary.

[Endorsed]: Filed August 11, 1953.

United States District Court, District of Oregon
No. Civil 6757—(Also: Civil
Nos. 6751 and 6762)

LEE GWAIN TOY and LEE GWAIN DOK,
Plaintiffs,

vs.

DEAN ACHESON, etc.,
Defendant.

Portland, Oregon, April 20, 1953

Before: Honorable James Alger Fee,
Chief Judge.

Appearances:

RODNEY W. BANKS,
Of Counsel for Plaintiffs in Civil Nos.
6751, 6757 and 6762.

JAMES P. POWERS,
Of Counsel for Plaintiff in Civil No. 6753.

No appearance was made in Civil No. 6761.

VICTOR E. HARR,
Assistant United States Attorney,
Of Counsel for Defendant.

TRANSCRIPT OF PROCEEDINGS

Mr. Harr: As your Honor perhaps knows, these cases may be all considered together. They arise because of Title 8, Section 903 of the Code, that a person born of parents either one or the other residing in this country, their offspring born in a

foreign nation may appear before the American Consulate and make application for a passport to this country by virtue of derivative citizenship. That has been the procedure. There have been a number of cases filed up and down the Coast, and quite a number of them here, where an alleged Chinese father, a citizen of this country, has returned to China, has married and they have had offspring.

The Court: They always have boys, I understand.

Mr. Harr: That is generally the rule, your Honor. And they then make application to the American Consulate, at the nearest office, and ask for a travel document. That is the basis of these five cases now before your Honor.

I would like to preface my statement, your Honor, with this comment: That as to each of these five cases we have not received the Department of State file. The motion is predicated entirely upon the complaint as filed by the plaintiff.

Section 903 provides that if any person who claims a right or privilege as a national of the United States is denied such right and privilege he may file suit in the Federal District Court applying for citizenship, for an order of citizenship. The complaints in each of these five cases state that such applications were made to the Secretary of State Consul either at Canton, China, or Hong-kong. And all the complaints further state that there was no rejection of the [2*] travel document,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

but that the Consulate officer, for reasons of his own, was dilatory and did not act upon the matter, and therefore they have the right to have the Court determine that they are citizens.

Now, I don't believe that they meet the test. I think in one instance the allegation is that an application was made in August of 1947 to the American Consul at Canton, China, and that the application was later transferred, at a later date, to Hongkong. Now, it would seem that they are rather old cases. I am not in possession of facts to explain why that delay. In another case an application was made at Hongkong in March of 1952, and they say that the Consulate officer should have acted upon it; in another case, February, 1952; another in July, 1952; and another one in September of 1951.

But I contend this, your Honor, and my motion is based upon Section 903 of the Code, that the Court has no jurisdiction to entertain these suits because there has been no denial by the Consulate officer.

Mr. Banks: If the Court please, I presume your Honor is familiar with Section 903 of the Nationality Act, which states that if any person who claims a right or privilege as a national of the United States is denied such right or privilege by any department or agency or executive officer thereof upon the ground that he is not a national of the United States, such [3] person, regardless of whether he is within the United States or abroad, may institute an action against the head of such department of the United States for the District of Columbia or

in the District Court of the United States for the District in which such person claims a permanent residence, for a judgment declaring him to be a national of the United States.

In two of these cases the application was made in Canton or Hongkong in the years 1947 and 1948. The Consul has allowed an unreasonable delay of all this time, and has never acted directly or indirectly on this, which we feel is a direct refusal to issue the certificate of identity to enable the son to come over here to be heard in his trial. They might have long gray beards before the Consul would act over there, and we feel that they have a right to have their cases heard here upon the merits, and if it is proved that they are sons of these citizens they are American citizens. Their rights are being jeopardized because of the Consul's failure to act for, in several of these, a period of four or five years, there has been no word heard from them.

I don't believe Counsel has cited any cases directly in point. We have some cases that indicate that this dilatory action on the part of the Consul amounts to a denial. If your Honor cares to hear some of those cases—they are not directly in point, but they do indicate that the Consul must take some action within—— [4]

The Court: You agree that the method that has been used in absentia has been that of following the administrative procedure first.

Mr. Banks: Since 1940, since this act, you mean, your Honor?

The Court: No, I mean for 50 years before that.

Mr. Banks: I am not too familiar with how they operated before.

The Court: I am.

Mr. Banks: That is, before the act.

The Court: I am. I don't think that they intended to change that myself. I think that these proceedings are supposed to go through the administrative boards here and then go to the Court of Appeals. That is the normal course, and has been ever since I can remember.

Mr. Banks: I know most of the cases have been in San Francisco and Seattle. There have just been a few here. Since 1940 it seems that the Courts have entertained these cases under this section.

The Court: I never have. I don't know of any binding authority. There is no authority in the Ninth Circuit.

Mr. Banks: Except the wording of this Section 903, whatever interpretation might be placed on it.

The Court: Yes. But that is what I say, I think the procedure has always been otherwise. I don't think that the act [5] was intended to change the procedure myself.

Mr. Banks: I guess there have been several hundred cases filed under it, and several cases appealed under this section, too. But I don't believe that question has ever come up on them.

The Court: Most of the cases that have been appealed have been the Japanese cases, which is an entirely different situation, as I understand it.

Mr. Banks: I can't answer that. It is according to how the Court's view of this section is.

The Court: As I say, I don't see any reason to reverse the procedure, and I don't think that this was intended to give the Court that right.

Mr. Banks: Of course, I don't want to argue with your Honor. It just says in the section——

The Court: You don't know the history.

Mr. Banks: Possibly not.

The Court: That is what I said. I know the history for 50 years. It has been a different type of procedure. It seems to me that if Congress wanted to change that Congress would have said so.

Mr. Banks: I don't know the history, but I just know this section, and it seems to me that this section would be clear as to what a person's rights would be under that situation.

The Court: You admit there is no denial. [6]

Mr. Banks: No official denial. But they have waited for four and five years. We feel that that is tantamount to a denial.

The Court: I don't see that, either. And at the present time you have not made any motion to substitute somebody for Acheson?

Mr. Banks: Yes, I did, your Honor. It probably is not in the file, but I did that last week.

The Court: All right. I think that that is a better ground to go on than the other, because, as I understand it, in that you have to indicate that there is a proper ground, and that is why I think I will deny the motions and dismiss the cases on that ground.

Mr. Banks: Dismiss the case on the substitution, you mean?

The Court: Yes, on the ground that substitution cannot be made at present under the statute.

Mr. Banks: I have an associate here that might wish to say something. He has a case.

Mr. Powers: Your Honor, I don't believe that there is anything I could add. Our procedure was under this Section 903, which we contend allows anybody whose rights as an American citizen have been denied by in this case the Consul abroad to bring this action. Our theory in this particular case is that even though there has been no official denial by the Consul, he has refused to act at all, or at least has not acted at all [7] for an unreasonable length of time, and therefore that is tantamount to a denial of the rights of these plaintiffs. And under the section of the Code that is involved here they have a right to bring a case in the District Court where they claim permanent residence, which has been done in this case. It seems to me that if the statute is going to be construed to mean that that denial has to be an official denial, the Consul by simply refusing to decide any particular case would absolutely make this section of the Code a nullity and no proceeding could ever be brought under it. That is the position in the case which I represent, which is only one of the cases.

The Court: Has your man ever been in the United States?

Mr. Powers: You mean the sons? No, they never have, your Honor.

The Court: How can he claim residence?

Mr. Powers: Through the father, your Honor. His father is a resident here.

The Court: I don't think that this section was ever intended for that sort of a maneuver. I don't think he has any residence here.

Mr. Powers: All we are attempting to do, your Honor, is get a judicial trial so that the Court can determine the question.

The Court: I know, but he has never been here. How can he be a resident? [8]

Mr. Powers: I believe he is entitled to claim a residence in this country. Being a minor it would be through his father.

The Court: Not if he never has been here.

Mr. Harr: There was a recent case, your Honor—perhaps your Honor has read it. I think it was decided in January by Judge Goodman. He comments along the lines your Honor has commented, that in his opinion Section 903 was never intended to cover situations of this kind. He stated that it was his opinion that 903 was intended to cover those cases where people had perhaps expatriated themselves by some conduct. And you will note that 903 follows Sections 901 and 902, and 901 and 902 cover such instances as people living abroad who have lost their citizenship. Those were people who had already had citizenship, and this was a procedure set up by Congress to deal with those cases rather than with these foreign-born people.

Mr. Powers: That is all I can say on the subject, your Honor.

The Court: In each of these cases have motions to substitute been filed?

Mr. Banks: Yes, your Honor.

Mr. Powers: I don't believe that is true in my case. No, it has not in my case.

Mr. Harr: I believe just in those cases that Mr. Banks represents have motions been filed.

The Court: In any one of these cases has the person ever [9] been in the United States? In any of your cases?

Mr. Banks: No, your Honor.

Mr. Harr: I notice there is one more case, and I wasn't aware of this when I first addressed the Court. Mr. Maurice Corcoran is attorney in one of the cases here. I thought Mr. Banks represented them all, but I see Mr. Corcoran is the attorney in the Chee case. I don't believe he is in court.

The Court: What is your case? Is that the Ming case?

Mr. Powers: That is the Ming case, 6753, your Honor.

Mr. Harr: I believe Maurice Corcoran is in 6761, Chee.

The Court: In 6751, *Yeau vs. Acheson*; 6757, *Toy vs. Acheson*, and 6762, *Gay vs. Acheson*, the motions to substitute are denied, and in each case the case is dismissed because the statutory requirement of a motion to substitute cannot be performed, it having been stated in the record that the plaintiff has never been a resident of the United States.

In the Ming case, there being no motion to substitute, the cause is dismissed for failure to file such

a motion to substitute, and likewise it is dismissed upon the ground set out in the motion, it being admitted in this record that Ming has never been actually within the limits of the United States.

The Chee case is dismissed for failure to prosecute.

(Whereupon proceedings in the above matters on said day were concluded.) [10]

REPORTER'S CERTIFICATE

I, John S. Beckwith, hereby certify that I am an official court reporter for the United States District Court, District of Oregon; that as such official court reporter I reported in shorthand the proceedings had in the above-entitled matters on April 20, 1953; that thereafter I prepared a typewritten transcript from my shorthand notes, so taken, of said proceedings, and that the foregoing transcript, pages 1 through 10, inclusive, constitute a full, true and correct transcript of said proceedings, so taken by me in shorthand on said day.

Dated this 25th day of August, 1953.

/s/ JOHN S. BECKWITH,
Official Court Reporter.

[Endorsed]: Filed June 10, 1953.

United States District Court, District of Oregon
No. Civil 6752—(Also Civil No. 6622)

LEE WING GUE, by His Father and Next Friend,
LEE SUN YUE,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the
United States of America,

Defendant.

Portland, Oregon, April 27, 1953

Before: Honorable James Alger Fee,
Chief Judge.

Appearances:

RODNEY W. BANKS,
Of Attorneys for Plaintiffs.

VICTOR E. HARR,
Assistant United States Attorney,
Of Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS

Mr. Banks: In these cases the plaintiff has filed a motion to make substitution of Dulles for Acheson. I don't believe that the United States Attorney has filed a motion to dismiss in this case as he did in the others that we heard the other day. However, in view of your Honor's rulings in those other cases I presume that you will dismiss these cases upon my motions to substitute.

However, I do wish to say that in the Chew case the Consul has made an official denial of the plaintiff's application, but as I understand you are not taking that into consideration in your ruling. It is based primarily that we do not have the right to substitute.

The Court: In each of these instances has the plaintiff ever been in the United States?

Mr. Banks: No, your Honor.

The Court: They are the same situation?

Mr. Banks: The same situation.

The Court: Thank you.

Mr. Harr: Your Honor, when I filed those other motions that came on a week ago I thought in each of these cases that the American Consul had denied the application for passport, and I didn't know until this morning that in one of the cases they had not made such a denial. In that particular case, No. 6752, I would like to add that as an additional ground: That it shows on the face of the complaint that the rights have not been denied plaintiff and therefore it is improperly brought.

The Court: Yes. I will deny the motions to substitute.

Mr. Harr: Your Honor, should the order also incorporate the language that the plaintiffs not having resided in the United States the Nationality Act does not apply?

The Court: Yes, it should have that language. That was counsel's statement in court.

(Whereupon proceedings in said matters on said day were concluded.)

Reporter's Certificate

I, John S. Beckwith, hereby certify that I am an official court reporter for the United States District Court, District of Oregon; that as such official court reporter I reported in shorthand the proceedings had in the above-entitled matters on April 27, 1953; that thereafter I prepared a typewritten transcript from my shorthand notes, so taken, of said proceedings, and that the foregoing transcript, pages 1 and 2, constitute a full, true and correct transcript of said proceedings, so taken by me in shorthand on said day.

Dated this 25th day of August, 1953.

/s/ JOHN S. BECKWITH,
Official Court Reporter.

[Endorsed]: Filed August 25, 1953.

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents numbered from 1 to 15, inclusive, consisting of Complaint, Answer, Motion to dismiss; Motion for substitution of party defendant; Affidavit in support of motion for substitution of party defendant; Notice of motion; Order dated April 20, 1953; Memorandum opinion; Order dated June 18, 1953; Order of dismissal dated June 18, 1953; Notice of appeal; Bond

[Endorsed]: Nos. 14030, 14031, 14032, 14033, 14034. United States Court of Appeals for the Ninth Circuit. Lee Gwain Toy and Lee Gwain Dok, by Their Father and Next Freind Lee Ben Koon, Appellant, vs. Dean G. Acheson, Secretary of State of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed September 16, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14033

LEE GWAIN TOY and LEE GWAIN DOK, by
Their Father and Next Friend LEE BEN
KOON,

Appellants,

vs.

DEAN G. ACHESON, Secretary of State of the
United States of America,

Appellee.

STATEMENT OF POINTS UPON WHICH AP-
PELLANTS WILL RELY ON APPEAL

Appellants having filed their notice of appeal
from the order made and entered in the District

Court of the United States for the District of Oregon, on June 18, 1953, and having designated the record to be included on appeal in this Court, hereby file their statement of points on which they intend to rely upon appeal, as follows:

1. That the trial court erred in denying appellants' timely motion to substitute John Foster Dulles, Secretary of State of the United States as party defendant for and in place of Dean G. Acheson.

2. That the trial court erred in dismissing the within cause on the ground that the Department of State, through its consulate officer, has never denied appellants' application for entry into the United States.

3. That the trial court erred in dismissing said cause on the ground that appellants had never resided in the United States of America.

4. That the trial court erred in dismissing said cause on the ground that Section 903, Title 8, U. S. C.A., never intended that individuals asserting claims such as that asserted by plaintiffs herein, who have lived their lives as a Chinese and who have never been in the United States, have the status and right to avail themselves of Section 903, Title 8, U.S.C.A.

RODNEY W. BANKS,

J. P. SANDERSON,

By /s/ RODNEY W. BANKS,

Attorneys for Appellants.

Receipt of copy herein accepted this 29th day of
September, 1953.

HENRY L. HESS,

United States Attorney for
the District of Oregon,

By /s/ VICTOR E. HARR,

Assistant United States At-
torney.

[Endorsed]: Filed September 30, 1953.

In the United States Court of Appeals
for the Ninth Circuit

No. 14033

LEE GWAIN TOY and LEE GWAIN DOK, by
Their Father and Next Friend LEE BEN
KOON,

No. 14030

WOO CHIN CHEW, by His Father and Next
Friend WOO YUEN PAK,

No. 14031

JOONG TUNG YEAU, by His Brother and Next
Friend JOONG YEAU HING,

No. 14032

LEE WING GUE, by His Father and Next Friend
LEE SUN YUE,

No. 14034

LOUIE HOY GAY, by His Father and Next
Friend LOUIE FOO,

Appellants,

vs.

DEAN G. ACHESON, Secretary of State of the
United States of America,

Appellee.

STIPULATION FOR CONSOLIDATION OF
ABOVE ENTITLED CAUSES FOR HEAR-
ING ON APPEAL

It is Hereby Stipulated and Agreed by and between the parties to the above-entitled causes, by and through their respective attorneys, that subject to the approval of this Court said causes be consolidated for hearing and determination in the above-entitled Court.

It is Further Stipulated and Agreed that the printed transcript of record in Case No. 14033, Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon, appellants, vs. Dean G. Acheson, Secretary of State of the United States of America, appellee, may be used and considered as the printed transcript of record in the other above causes and that the printing of a transcript of record in said other causes may be dispensed with.

It is Further Stipulated and Agreed that the statement of points in said Case No. 14033, Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon, appellants, vs. Dean G.

Acheson, Secretary of State of the United States of America, appellee, embraces all of the statement of points which the appellant is filing with this Court in each of the above other causes.

It is Further Stipulated and Agreed that in the determination of each of the above causes the United States Court of Appeals for the Ninth Circuit may consider the original record in each of the causes to be consolidated in their original form as exhibits herein without the necessity of their being printed as part of the transcript of record herein, save and except the record in Case No. 14033, Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon, appellants, vs. Dean G. Acheson, Secretary of State of the United States of America, appellee, which will be printed as aforesaid.

It is Further Stipulated and Agreed that there has been prepared and forwarded herewith to the United States Court of Appeals for the Ninth Circuit for filing a statement of points in each of said causes, which said statements by this reference are incorporated herein as a part of this stipulation, and that in the determination of each of the within causes the United States Court of Appeals for the Ninth Circuit may consider said points in their original form without the necessity of their being printed, save and except the printing of the statement of points in said Case No. 14033, Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon, appellants, vs. Dean G.

Acheson, Secretary of State of the United States of America, appellee.

It is Further Stipulated and Agreed that it is the opinion of the undersigned that the questions of law and fact embodied in these causes sought to be consolidated are closely identical and can be adequately presented by a transcript of record in Case No. 14033, Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon, appellants, vs. Dean G. Acheson, Secretary of State of the United States of America, appellee, and a consolidated brief therein.

It is Further Stipulated and Agreed that this stipulation be printed and made a part of the printed transcript of record in Case No. 14033, Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon, appellants, vs. Dean G. Acheson, Secretary of State of the United States of America, appellee.

Dated this 28th day of September, 1953, at Portland, Oregon.

RODNEY W. BANKS,

J. P. SANDERSON,

Attorneys for Appellants.

By /s/ RODNEY W. BANKS.

HENRY L. HESS,

United States Attorney for
the District of Oregon,

By /s/ VICTOR E. HARR,
Assistant United States At-
torney.

So Ordered:

/s/ ALBERT LEE STEVENS,
Acting Chief Judge.

/s/ WM. HEALY,

/s/ HOMER T. BONE,
United States Circuit Judges.

[Endorsed]: Filed October 1, 1953.

In the United States Court of Appeals
for the Ninth Circuit

No. 14033

LEE GWAIN TOY and LEE GWAIN DOK, by
Their Father and Next Friend LEE BEN
KOON,

No. 14030

WOO CHIN CHEW, by His Father and Next
Friend WOO YUEN PAK,

No. 14031

JOONG TUNG YEAU, by His Brother and Next
Friend JOONG YUEN HING,

No. 14032

LEE WING GUE, by His Father and Next Friend
LEE SUN YUE,

No. 14034

LOUIE HOY GAY, by His Father and Next
Friend LOUIE FOO,

Appellants,

vs.

DEAN G. ACHESON, Secretary of State of the
United States of America,

Appellee.

No. 13963

CHIN CHUCK MING and CHIN CHUCK
SANG, by Their Next Friend and Father,
CHIN AH POY,

Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of
the United States of America,

Appellee.

STIPULATION CONSOLIDATING CAUSES
FOR BRIEF AND HEARING

It is Hereby Stipulated and Agreed by and between the parties to the above-entitled causes, by and through their respective attorneys, that subject to the approval of this court said causes be consolidated for hearing and determination in the above-entitled court.

It is Further Stipulated and Agreed that a stipulation has been entered into heretofore in the cases of:

No. 14033

LEE GWAIN TOY and LEE GWAIN DOK, by
Their Father and Next Friend LEE BEN
KOON,

No. 14030

WOO CHIN CHEW, by His Father and Next
Friend WOO YUEN PAK,

No. 14031

JOONG TUNG YEAU, by His Brother and Next
Friend JOONG YUEN HING,

No. 14032

LEE WING GUE, by His Father and Next Friend
LEE SUN YUE,

No. 14034

LOUIE HOY GAY, by His Father and Next
Friend LOUIE FOO,

Appellants,

vs.

DEAN ACHESON, Secretary of State of the
United States of America,

Appellee.

the terms and provisions of which Stipulation are
incorporated herein by reference and made a part
hereof.

It is Further Stipulated that it is the opinion of
the undersigned that the questions of law and fact

embodied in all of the above-entitled causes, including the cause of:

No. 13963

CHIN CHUCK MING and CHIN CHUCK
SANG, by Their Next Friend and Father,
CHIN AH POY,

Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of
the United States of America,

Appellee.

are closely identical and can be adequately presented by a transcript of record in case No. 14033 (Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon), and the other records and files provided for in said stipulation above referred to, and in addition the transcript of record in case No. 13963 (Chin Chuck Ming and Chin Chuck Sang, by their next friend and father Chin Ah Poy) in the determination of said case, and a consolidated brief therein covering all of the above-entitled causes.

It is Further Stipulated and Agreed, pursuant to the approval of the above-entitled court, that the time for the filing of the Appellants' Brief in said case No. 13963 be extended to the time of the filing of the consolidated brief covering all of said cases hereinabove mentioned.

Dated this 28th day of September, 1953, at Portland, Oregon.

RODNEY W. BANKS,

J. P. SANDERSON,

Attorneys for Appellants in Cases Nos. 14033, 14030, 14031, 14032 and 14034.

By /s/ RODNEY W. BANKS.

JOSEPH & POWERS,

Attorneys for Appellants, Chin Chuck Ming and Chin Chuck Sang,

By /s/ JAMES P. POWERS.

HENRY L. HESS,

United States Attorney for
the District of Oregon,

By /s/ VICTOR E. HARR,

Assistant United States Attorney.

So Ordered:

/s/ ALBERT LEE STEVENS,
Acting Chief Judge.

/s/ WILLIAM HEALY,
United States Circuit Judge.

[Endorsed]: Filed October 1, 1953.

